Hyatt Hotels, Inc., d/b/a Hyatt Regency Phoenix *and* International Union of Operating Engineers, Local 428, AFL-CIO. Case 28-CA-6325

July 2, 1981

DECISION AND ORDER

Upon a charge filed on March 2, 1981, by International Union of Operating Engineers, Local 428, AFL-CIO, herein called the Union, and duly served on Hyatt Hotels, Inc. d/b/a Hyatt Regency Phoenix, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on March 20, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 29, 1980, following a Board election in Case 28-RC-3803, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 19, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 30, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 8, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 13, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a reply to the Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and reply to the Motion for Summary Judgment, Respondent basically contends that the certification of the Union in the underlying representation case is invalid because the certified bargaining unit is inappropriate, the representation election was invalid for the reasons specified in Respondent's objections to that election, and Respondent was deprived of its due process rights. The General Counsel argues that these material issues have been previously decided, that there are no litigable issues of fact, and thus that the Board should grant the Motion for Summary Judgment. We agree with the General Counsel.

Our review of the record herein, including the record in Case 28-RC-3803, discloses that pursuant to a representation petition filed on March 10, 1980, a represention hearing in which Respondent participated was conducted. Thereafter, on April 11, 1980, the Regional Director for Region 28 issued a Decision and Direction of Election in which he found, *inter alia*, that the petitioned-for unit of maintenance and engineering department employees was an appropriate unit, that Ed Duffy was not a supervisor within the meaning of the Act, and that the Hearing Officer did not err in prohibiting Respondent from questioning witnesses concerning the extent of the Union's organizational activity.

Thereafter, Respondent filed a timely request for review of the Regional Director's decision, alleging that the Regional Director had departed from Board precedent, had made erroneous factual findings, and had improperly ruled on the Hearing Officer's refusal to permit inquiry on the Union's extent of organization. Respondent also requested that the Board reconsider its rules and policies, and that the election be stayed. On May 6, 1980, the Board granted Respondent's request for review only with respect to the unit scope issue, but did not stay the election. In all other respects, the Board denied Respondent's request for review. On June 27, 1980, the Board issued a telegraphic order in which it affirmed the Regional Director's unit determination, and remanded the case to the Region for the opening and counting of ballots.

On July 2, 1980, the impounded ballots of the election conducted on May 7, 1980, were opened and counted: 10 votes were cast for and 6 against the Union, with no challenged ballots. Thereafter, Respondent filed timely objections to the conduct of the election and to conduct affecting the results of the election. The objections alleged in substance that the election should be set aside because the

[1] Official notice is taken of the record in the representation proceeding, Case 28-RC-3803, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Region failed to permit an employee to vote by mail ballot, and because the conduct of Ed Duffy interfered with the election because he was a prounion supervisor. On July 29, 1980, the Regional Director overruled Respondent's objections in their entirety. The Regional Director found that Respondent submitted no evidence to support its objection on the mail ballot issue, and even assuming the allegations to be true, it would not have affected the outcome of the election. As to the objections on alleged supervisor misconduct, the Regional Director concluded that Duffy's supervisory status had been previously determined by the Regional Director and the Board, and that Respondent offered no new evidence to support its contention.

Thereafter, Respondent filed a timely request for review of the Regional Director's supplemental decision. Respondent reiterated its objections to the election, and further claimed that the Regional Director ignored evidence previously submitted by Respondent and that Respondent was denied due process by the Regional Director's failure to hold a hearing based on Respondent's *prima facie* evidence of objectionable conduct. On August 27, 1980, the Board by telegraphic order denied Respondent's request for review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

Except as follows, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

However, Respondent now raises for the first time another argument. Respondent asserts that it is not attempting to relitigate here the supervisory status of Duffy in a "related" unfair labor practice case. Rather, Respondent asserts that the question of Duffy's status concerns the impact of his alleged organizational and other union activities on the election, not his inclusion or exclusion from the unit. Thus, Respondent contends that the supervisory issue here is analogous to the situation in which the General Counsel is permitted to litigate the supervisory status of an individual who is alleged to have committed actions violative of Section 8(a)(1) or (3) of the Act, but whose status had been previously decided in a representation proceeding.[3] Respondent contends that the Regional Director should have reexamined Duffy's alleged supervisory status, and that the Board should not grant summary judgment in the instant case.

Contrary to Respondent's contentions, the instant 8(a)(5) summary judgment proceeding is a "related subsequent unfair labor practice proceeding" which precludes relitigation of an issue on which the Board has previously denied a request for review. See Section 102.67(f) of the Board's Rules and Regulations, Series 8, as amended. The precise issues raised by Respondent here—whether Duffy is a supervisor and whether his union activities interfered with the election—were decided by the Regional Director. The Board subsequently denied Respondent's request for review of the Regional Director's decision regarding Duffy and his activities. Respondent merely continues in this summary judgment proceeding to argue that the Regional Director, and the Board, erred because the Regional Director's decision, according to Respondent, "is not supported by the record." Therefore, this case stands in a different posture than those cited by Respondent in which independent actions of an individual are alleged, in a *different* proceeding not *arising* out of the representation proceeding, to violate Section 8(a)(1) or (3) of the Act, i.e., cases which do not involve a technical violation of Section 8(a)(5), so that a respondent may test the Board's certification. We agree with the General Counsel that Respondent in the instant proceeding is attempting to test in the courts issues which the Board has ruled on in the underlying representation proceeding. Indeed, Respondent's letter to the Union explaining Respondent's refusal to bargain with the Union supports this conclusion. Thus, Respondent by its argument is raising issues which were or could have been litigated in a prior representation proceeding, and has not raised a meritorious defense to the Motion for Summary Judgment.

In its answer to the complaint, Respondent denied that since February 6, 1981, and continuing to date, the Union requested Respondent to recognize and to bargain with it as the exclusive collec-

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Respondent cities *Amalgamated Clothing Workers of America, AFL-CIO (Sagamore Shirt, d/b/a Spruce Pine Mfg. Co.)* v. *N.L.R.B.*, 365 F.2d 898 (D.C. Cir. 1966), and *Stanley Air Tools, Division of the Stanley Works*, 171 NLRB 388 (1968), enfd. 432 F.2d 358 (6th Cir. 1970), among others, to support its contention.

tive-bargaining representative of the employees in the certified maintenance and engineering department unit. In its reply to the Motion for Summary Judgment, Respondent does not further address this denial. The Motion for Summary Judgment includes as an exhibit a letter, dated February 6, 1981, from the Union to Respondent in which, *inter alia*, the Union formally requested to bargain with Respondent. Respondent has not denied the authenticity of this document. Therefore, we find the relevant complaint allegations involving it to be established as true.[4]

Accordingly, for the reasons stated above, we find that Respondent has at all times material herein refused to recognize and bargain with the Union, upon request, and that its refusal to do so is violative of Section 8(a)(5) and (1) of the Act.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all material times herein, an Illinois corporation with a facility and place of business in Phoenix, Arizona, where it is engaged in the operation of a hotel. During the 12-month period preceding issuance of the complaint, a representative period, Respondent, in the course and conduct of its business as described above, derived gross revenues in excess of $500,000. During this same time period, Respondent also purchased goods and materials valued in excess of $10,000 which were transported in interstate commerce and delivered to its place of business in the State of Arizona directly from suppliers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 428, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed in the maintenance and engineering department at the Respondent's facility located at 122 North Second Street, Phoenix, Arizona, exluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act.

2. The certification

On May 7, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 29, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 6, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 19, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 19, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

[4] See, e.g., *Eskimo Radiator Mfg. Co.*, 255 NLRB No. 43, fn.3 (1981).

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Hyatt Hotels, Inc., d/b/a Hyatt Regency Phoenix, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 428, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed in the maintenance and engineering department at Respondent's facility located at 122 North Second Street, Phoenix, Arizona, excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 29, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 19, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hyatt Hotels, Inc., d/b/a Hyatt Regency Phoenix, Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 428, AFL-CIO as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed in the maintenance and engineering department at the Respondent's facility located at 122 North Second Street, Phoenix, Arizona; excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Phoenix, Arizona, facility, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 428, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees employed in the maintenance and engineering department at the Employer's facility located at 122 North Second Street, Phoenix, Arizona, excluding all other employees, office clerical employees, guards, watchmen, and supervisors as defined in the Act.

HYATT HOTELS, INC., D/B/A HYATT REGENCY PHOENIX